No. ~~1886~~

70-339

Supreme Court, U.S.
FILED
JUN 25 1971
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1970

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

ROBERT B. TRUITMAN, JR., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES A. HORSKY
MICHAEL BOUDIN
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorneys for Southern Railway Company

Of Counsel:

EARLE B. MAY, JR.
8th Floor, Haas-Howell Bldg.
Atlanta, Georgia 30303

June 1971

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	17
APPENDICES	1a

TABLE OF AUTHORITIES

CASES:

Cincinnati, N.O. & T.P. Ry. v. *United States*, 229 F. Supp. 572 (S.D. Ohio 1964), *modified sub nom. Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965) 5

Coyne v. *Superior Incinerator Co.*, 80 F.2d 844 (2d Cir. 1936) 12

Crocker v. *United States*, 240 U.S. 74 (1916) 10

Edward v. *Mayes*, 385 F.2d 369 (4th Cir. 1967) 15

Ewing v. *National Airport Corp.*, 115 F.2d 859 (4th Cir. 1940), *cert. denied*, 312 U.S. 705 (1941) 10

Gesellschaft Fur Drahtlose Telegraphie M.B.H. v. *Brown*, 78 F.2d 410 (D.C. Cir.), *cert. denied*, 296 U.S. 618 (1935) 14

Grain in Multiple-Car Shipments, 321 I.C.C. 582 (1963) 3

Hazelton v. *Sheckells*, 202 U.S. 71 (1906) 10, 14, 16-17

Howard v. *Lyons*, 360 U.S. 593 (1950) 9

Meguire v. *Corwine*, 101 U.S. 108 (1880) 14

Meitz v. *Garrison*, 413 F.2d 895 (8th Cir. 1969) 15

Moffett v. *Arabian American Oil Co.*, 85 F.Supp. 174 (S.D. N.Y. 1949), *aff'd*, 184 F.2d 859 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951) 11-12

Noonan v. *Gilbert*, 68 F.2d 775 (D.C. Cir. 1934) 14

Oscanyan v. *Arms Co.*, 103 U.S. 261 (1881) 9-11, 17

Tool Co. v. *Norris*, 69 U.S. 45 (1865) 9-11, 13, 17

Trist v. *Child*, 88 U.S. 441 (1875) 10, 13-14

United States v. *Mississippi Valley Co.*, 364 U.S. 520 (1961) .. 17

Woodstock Iron Co. v. *Extension Co.*, 129 U.S. 643 (1889) 10

Page

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 6

MISCELLANEOUS:

Annot., 46 A.L.R. 196 (1927) 10

Annot., 148 A.L.R. 768 (1944) 10

6A Corbin, *Contracts* (1962) 14

Executive Order No. 11222, § 1, 30 Fed. Reg. 6469 (1965) ... 12

Sup. Ct. Rule 19 9

Supreme Court of the United States

OCTOBER TERM, 1970

No.

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

ROBERT B. TROUTMAN, JR., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Southern Railway Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears as Appendix A to this petition, p. 1a, *infra*. The opinion of the District Court denying a mo-

tion for summary judgment is reported at 296 F. Supp. 963 and appears as Appendix B, p. 10a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1971, and appears as Appendix C, p. 27a, *infra*. A timely petition for rehearing was denied on May 18, 1971; the order denying rehearing appears as Appendix D, p. 28a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the long-standing prohibition of this Court against judicial enforcement of agreements contemplating the exercise of personal or political influence to obtain action by a federal official exempt from the prohibition those agreements where influence is to be exercised to obtain access to an official not otherwise available?

2. Does this Court's century-old rule broadly proscribing actions to recover fees which are contingent on obtaining favorable action by a federal official permit a jury to award a fee for such services which is measured largely by the successful result obtained and which offers the same inducement to improper conduct as the impermissible contingent fee?

STATEMENT OF THE CASE

This case presents important facets of a recurring problem: the public policy limitations governing suits by private parties to collect fees through the federal courts for activities designed to obtain favorable action by federal officials on matters of public business. The

basic facts relevant to this petition for certiorari are not in dispute.[1]

In July 1963, the Interstate Commerce Commission issued a decision ordering the petitioner Southern Railway Company to increase rates on certain grain shipments from the Midwest to the South. *Grain in Multiple-Car Shipments*, 321 I.C.C. 582 (1963). The ICC order, if put in force, would have caused Southern very large losses by diverting grain traffic from it to other carriers and idling a number of Southern's grain cars. See pp. 2a-3a, *infra*. Southern sought judicial review of the ICC order in the United States District Court for the Southern District of Ohio. *Id.*

In Southern's view, the ICC order was not only legally erroneous and harmful to Southern but likely to have serious adverse consequences on the economy of the South which relies upon grain imports from the Midwest. To secure the support in the review proceeding of the United States—an independent statutory party—Southern's vice-president Sim S. Wilbanks approached various persons who might share these views and whose support would be helpful. *E.g.*, App. 507-10. Among those approached was the respondent Robert B. Troutman, Jr.; as the Court of Appeals summarized, "Troutman, an Atlanta attorney, had no experience in I.C.C. matters, but he was known to Wil-

[1] The facts set forth in this petition are drawn from the opinions of the Court of Appeals and of the District Court, reprinted in and hereafter cited to appendices to this petition, and from the trial transcript and exhibits in the District Court. The three-volume appendix used in the Court of Appeals—a copy of which is being lodged with the Clerk of this Court—contains relevant portions of the trial transcript (Vols. I and II) and relevant exhibits (Vol. III) and those materials are hereafter cited respectively as "App. —" and "Ex. App. —".

banks as a personal and political ally of President John F. Kennedy." P. 2a, *infra*.[2]

Wilbanks met with Troutman on or about July 20, 1963. While Troutman lacked any expertise in ICC matters and was unfamiliar with the details of the grain rate controversy, Wilbanks knew of his relationship with President Kennedy (App. 485) and requested him to meet with the President in order to, in Troutman's words, "seek the President's intervention on Southern's behalf against [the] I.C.C." Ex. App. 22. As Troutman himself explained, "I think that what Mr. Wilbanks had in mind was that maybe I had sufficient standing with the President of the United States to get an audience to present on its merits the case of the Southern Railway in this matter . . . ." App. 714.

After studying relevant papers subsequently furnished by Wilbanks, Troutman telephoned the White House and obtained an appointment with President Kennedy for the day following the call. App. 361-62. At that meeting Troutman explained the grain rate controversy to the President, including reasons why its consequences would be harmful. P. 15a, *infra*. A White House staff member was directed to investigate the matter and the staff ultimately reported to the President that the ICC order was a very bad one. *Id.*

---

[2] Troutman was a long-time friend of the Kennedy family, who had known Joseph P. Kennedy, Jr., at law school. App. 345. John F. Kennedy had visted Troutman's home in Atlanta and Troutman had assisted John F. Kennedy before, during and after the political convention that nominated him for President. *Id.* 171, 345-49. On several occasions after the election Troutman had recommended individuals for positions in the Kennedy administration. *Id.* 355-56.

During the following eight weeks Troutman had several more meetings with President Kennedy and with the staff member to discuss the ICC order and sought to obtain additional information for the President. P. 16a, *infra*. At the President's request Troutman canvassed a number of Southern Congressmen to obtain their views and support and he met several times with officials of the Department of Justice. *Id.* At the same time Wilbanks was contacting other persons, both in and out of Congress, for the purpose of building additional support for adoption of Southern's position by the United States. *E.g.*, App. 507-10, 524-25. On September 19, 1963, the Department of Justice announced that it was adopting Southern's position and after extensive litigation, in which Troutman played no part, the ICC order was set aside. Pp. 2a-3a, 16a, *infra*.[3]

Not long after the Department of Justice's announcement Wilbanks met again with Troutman. During prior discussions between them regarding Troutman's assistance in the grain rate controversy, there had been no reference to any "employment" of Troutman or any fee for his services, nor did Troutman send Southern an invoice for services after he ceased to participate. App. 378, 422. However, at this meeting Troutman testified that Wilbanks "said words to the effect that I had done this job for them and now what could he do for me, or words to that effect." *Id.* 261. Troutman replied that he would like Southern to engage with him in the joint development of air rights then

[3] The court litigation over the ICC grain rate order is reported in *Cincinnati, N.O. & T.P. Ry.* v. *United States*, 229 F. Supp. 572 (S.D. Ohio 1964), *modified sub nom. Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965).

separately owned by him and by Southern over adjacent tracts of property in Atlanta, a proposal he had made on earlier occasions. *Id.*

During the next several years Troutman and representatives of Southern discussed the joint development of the air rights on a number of occasions. App. 265-82. Ultimately, no agreement was reached although Southern offered to purchase Troutman's air rights. *Id.* 281-82. In late 1966 Troutman arranged to develop his air rights with another party. *Id.* 155. In June 1967 Troutman made a written demand for cash compensation from Southern for his services rendered in the grain rate controversy in 1963 (Ex. App. 17); in September 1967 Troutman filed suit for such compensation in the District Court below, premising jurisdiction on 28 U.S.C. § 1332.

After a motion by Southern for summary judgment had been denied (p. 10a, *infra*), a trial was had before a jury. Troutman took the position that Southern had incurred an "implied" obligation to compensate him. App. 138. He testified that his services during the nine-week period July 20 to September 19, 1963, were worth $175,000—almost $3,000 a day—based "primarily on the result." *Id.* 427.[4] Southern defended on the grounds, among others, that it had never obligated itself to pay Troutman cash compensation and had made substantial efforts to arrange joint develop-

[4] Troutman also furnished as witnesses three Atlanta lawyers who testified that the services in question were worth even more than $175,000. App. 464, 468, 726. Each based his testimony on a hypothetical question describing the services which gave substantial emphasis to the result of Troutman's activities, the outcome of the grain rate controversy, and the size of the savings to Southern. *Id.* 446-53.

ment of the air rights, as Troutman had requested. P. 3a, *infra*.

Alternatively, Southern asserted that, if it had agreed to pay Troutman for seeking the President's intervention, such an agreement would be unenforceable as an arrangement to exercise personal and political influence upon a federal official. *Id.* Southern was, of course, not seeking to disavow any express agreement made with Troutman for cash compensation since no such agreement was ever alleged by him. Rather it asserted, as to any obligation implied by law, the same public policy defenses that would apply to an explicit agreement to pay for the same services.

The District Judge charged the jury at considerable length on Southern's public policy defense (see pp. 7a-9a, *infra*), although the heart of the instructions is contained in the last three paragraphs. The instructions recognized that in many instances "it is illegal to agree for hire to bring personal or political influence to bear on a public official" (p. 9a, *infra*) but they qualified this precept in the following passage which is central to the first major issue in this case:

> "[O]ne may contract to use his personal connections or influence merely to gain access to a public official, or to obtain an audience with him, and such contract is clearly legal and permissible." P. 9a, *infra*.

The second major issue arises from the following sequence. The District Judge at the pre-charge conference initially agreed to charge that, if cash compensation was owing to Troutman, the value to Southern of the "result" obtained by Troutman's efforts was not itself a proper factor in fixing a reasonable

fee, but that the "result" might at most be relevant as demonstrating efficiency in performance of the services (App. 608-11); at that conference, such a restriction was strongly urged by Southern's counsel and belatedly opposed by Troutman's counsel. *Id.*[5] The District Judge, who had been only tentatively favorable to the restriction at the pre-charge conference, omitted the restriction in his actual charge to the jury. The jury returned a verdict of $175,000 for Troutman.

On appeal, the Court of Appeals for the Fifth Circuit affirmed. It conceded that an agreement to influence a public officer is unenforceable when it "contemplates the use of personal or political influence" rather than an appeal on the merits, but it adopted the District Court's position that "one may employ an agent or attorney to use his influence to gain access to a public official." P. 4a, *infra*. The Court of Appeals did not discuss the District Court's failure to instruct that the jury should not consider the value of the "result" of Troutman's services as such in fixing reasonable compensation, although Southern had specified the omission as an error and directed a section of its brief to the question. App. 842.

REASONS FOR GRANTING THE WRIT

In two important respects the rulings of the courts below are contrary to long-established principles laid

[5] The language of the instruction in question, originally prepared by Troutman's own counsel, reads as follows: "You are to consider this result merely as it bears upon your consideration of the efficiency with which the services were carried out, and in such a way upon their value, not from the standpoint of their value to the client." App. 139.

down by this Court governing compensation pursuant to agreements to influence action of federal officials.[6] The importance of the public policy questions presented by the rulings below, as well as the apparent departure from controlling decisions of this Court, makes the present case appropriate for plenary review. Sup. Ct. Rule 19.

1. The District Court and the Court of Appeals ruled as a matter of law that an agreement to exert for profit personal or political influence upon a federal official is valid so long as that influence is directed to obtaining access to the federal official in order to present an argument on the merits. See pp. 7-8, *supra*. This ruling imports a novel exception to the long line of authorities in this Court which condemn, without qualification or limitation, the sale of personal or political influence over the conduct of Federal Government operations whatever way that influence is to be exercised.

In a series of decisions dating as far back as a century, this Court laid down the broad principle that agreements intending the exercise of personal or political influence to procure official action are void as against public policy and suits to obtain compensation for the services involved will not be entertained by the courts. *Tool Co.* v. *Norris,* 69 U.S. 45 (1865); *Os-*

[6] As the District Court recognized (App. 800), public policy limitations applied by the federal courts in enforcing or refusing to enforce agreements to influence federal officers are themselves properly determined by federal standards. The subject is manifestly one of federal concern, compare *Howard* v. *Lyons,* 360 U.S. 593, 597 (1950), and indeed the judicial decisions deemed controlling by the Court of Appeals included the leading decisions of this Court.

canyan v. *Arms Co.*, 103 U.S. 261 (1881).[7] In the latter case, the public policy determination was concisely expressed by Mr. Justice Field:

> "Personal influence to be exercised over an officer of government . . . is not a vendible article in our system of law and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article." 103 U.S. at 273.

This prohibition on the sale of personal or political influence is directed not only to blatant cases where the federal official is shown to have been overborne by improper considerations, but embodies a broad preventive purpose to curtail both the opportunity for abuse and the appearance of it. Thus the law looks to "the general tendency of such agreements" and "closes the door to temptation" by refusing them recognition even where no improper conduct occurred when the agreement was carried out. *Tool Co.* v. *Norris*, 69 U.S. 45, 56 (1865).[8]

In the present case, the record demonstrates that Troutman, having no special acquaintance with ICC

---

[7] *Accord, Trist* v. *Child*, 88 U.S. 441 (1875); *Woodstock Iron Co.* v. *Extension Co.*, 129 U.S. 643 (1889); *Hazelton* v. *Sheckells*, 202 U.S. 71 (1906); *Crocker* v. *United States*, 240 U.S. 74 (1916). Later decisions including those of lower federal courts and state courts are contained in *Annot.*, 46 A.L.R. 196 (1927), and *Annot.*, 148 A.L.R. 768 (1944). See, *e.g.*, *Ewing* v. *National Airport Corp.*, 115 F.2d 859 (4th Cir. 1940), *cert. denied*, 312 U.S. 705 (1941).

[8] The prophylactic aim of the decisions is reflected in other corollaries. For example, the decisions hold that where as an integral part of the agreement the agent performs other services which are legitimate and compensable standing alone, no compensation will be permitted because the entire arrangement is void. *E.g.*, *Trist* v. *Child*, 88 U.S. 441 (1875); *Hazelton* v. *Sheckells*, 202 U.S. 71 (1906).

matters generally or the grain rate order in particular, was asked to intervene with the President precisely because of his personal and political relationship, as he himself recognized. See p. 4, *supra*. Without his personal and political influence, obviously Troutman could never have gained access to the President in this matter. In any event, the District Court expressly charged the jury that such influence used to gain access could lawfully be compensated, and the Court of Appeals expressly affirmed the charge on this issue, so the correctness of this public policy determination is squarely presented for review by this Court.

Nothing in the pertinent decisions of this Court suggests that any exception exists to the broadly framed rule against agreements to utilize personal or political influence which would immunize the sale of such influence used to obtain access to a federal officer. On the contrary, the landmark decisions in *Norris* and *Oscanyan*, cited at pp. 9-10, *supra*, employ unqualified language to proscribe all agreements which involve in substance the sale of such influence. As for the lower federal courts, the two decisions that have come to grips with the question of influence to obtain an official audience seem to have given different readings to the precedents of this Court, one lower court decision flatly condemning the agreement to exert such influence and the other appearing to uphold it.[9] Any doubts about

---

[9] In *Moffett* v. *Arabian American Oil Co.*, 85 F. Supp. 174 (S.D. N.Y. 1949), *aff'd*, 184 F.2d 859 (2nd Cir. 1950), *cert. denied*, 340 U.S. 948 (1951), the District Court refused compensation to a close friend of President Roosevelt who had been engaged by oil companies to intervene with the President in order to obtain financial aid for Saudi Arabia. The agent did confer several times with the President and other officials, and aid to Saudi Arabia was eventually procured, saving the oil companies sub-

the proper application of the principle established by this Court should be resolved by plenary review here.

The exception sanctioned by the courts below substantially undermines the broad preventive purpose upon which this Court's decisions rest. Where personal or political influence must be exercised to obtain an audience, there is an ever-present risk that at least in some instances—which can rarely be discovered and almost never proved (see p. 17, n. 13, *infra*)—the same influences will affect the substance of the official decision. In short, the "general tendency" of the agreement in such cases and the "temptation" it creates for the agent are no less dangerous than those which this Court addressed in the *Norris* case.

Moreover, even the very appearance of possible misconduct must be given serious weight in framing public policy restraints. In our governmental system each citizen's "complete confidence in the integrity of his government" is a primary purpose of such restraints. Executive Order No. 11222, § 1, 30 Fed. Reg. 6469 (1965) (government standards of ethics). Such

---

stantial sums. In holding the agreement unenforceable, the District Court stated that "on plaintiff's story alone he was chosen by his associates as a man, of course expert in the field, but by and large as much if not more for his close relation with the President." 85 F. Supp. at 181.

By contrast, an earlier decision—*Coyne* v. *Superior Incinerator Co.*, 80 F.2d 844 (2d Cir. 1936)—upheld compensation for an agent who was employed to promote purchases of incinerators by different communities, largely because he was well known to local businessmen and officials. It does not appear, however, that his acquaintance with any local official was of the close and direct kind involved in *Moffett* or in this case, nor that the agent contemplated any unique advantages such as gaining access to officials not otherwise available; the sales themselves, moreover, were made after public bidding. 80 F.2d at 846.

confidence can scarcely be advanced by sanctioning an arrangement which permits a lawyer to collect almost two hundred thousand dollars by effectively "selling" his unusual capacity to gain an audience with the President of the United States.[10] Thus, the practical implications of the lower court's rulings in this case are themselves an additional reason for a grant of certiorari by this Court.

2. The action of the courts below here is additionally objectionable and appropriate for review because it infringes the restrictions this Court has imposed upon payment of contingent fees for services designed to affect the conduct of the Federal Government. An error in instructions by the District Judge allowed the jury to make an award which, as demonstrated below, is in substance the same as a prohibited contingent fee. Its sanction by the Court of Appeals promises to undermine the contingent fee limitation entirely if not corrected by this Court.

Many of the same decisions already cited, and many other cases as well, have long proscribed and refused to enforce agreements for contingent fees to obtain official federal action, whether by executive officers or legislators. *E.g., Tool Co.* v. *Norris,* 69 U.S. 45 (1865);

---

[10] Any citizen is, of course, entitled to visit a federal official to urge that one course or another is in the public interest, and the official is fully entitled to listen to him. However, the Court of Appeals' reference to Troutman's constitutional right to petition his government (see p. 4a, *infra*) does not meet the issue: when may an agent collect through the courts a financial reward for such representation. As this Court stated in *Trist* v. *Child,* 88 U.S. 441, 452 (1875), "services [involving personal solicitation of officials] . . . gratuitously rendered, are not unlawful . . . . The taint lies in the stipulation for pay." For it is that incentive which creates "the tendency to mischief."

Trist v. *Child*, 88 U.S. 441 (1875).[11] Although the roots in public policy are similar, the limitation on contingent fees in such cases is independent of the rule barring the sale of personal or political influence and operates where no such influence was contemplated or exercised. *E.g.*, *Noonan* v. *Gilbert*, 68 F.2d 775 (D.C. Cir. 1934).

The courts have recognized that attempts to obtain legislative and executive action, often occurring in private discussions without the safeguards attending judicial proceedings, create a special vulnerability to abusive conduct. That danger is increased when the contingent fee is employed because it is likely to exert special pressure on the agent to succeed in his enterprise by whatever means are necessary, including unlawful ones. Upon this reasoning, the contingent fee is barred, with exceptions not here relevant, for a range of otherwise legitimate activities to affect Federal Government operations. As strongly expressed by this Court in the *Trist* case:

> "Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worse form is greatly increased. . . . [The law] will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare." 88 U.S. at 452.

---

[11] Other early examples are *Meguire* v. *Corwine*, 101 U.S. 108 (1880), and *Hazelton* v. *Sheckells*, 202 U.S. 71 (1906). The relevant decisions, including recent ones, are collected in 6A Corbin, *Contracts* §§ 1447-54 (1962). A few exceptions exist to the general rule—*e.g.*, enforcement of debt claims against the Federal Government—but such exceptions have themselves been narrowly construed and the general rule reaffirmed. *Gesellschaft Für Drahtlose Telegraphie M.B.H.* v. *Brown*, 78 F.2d 410 (D.C. Cir.), *cert. denied*, 296 U.S. 618 (1935).

In the present case the award was in essence a contingent fee. Its size was determined, in accord with Troutman's own appraisal, "primarily on the result." See p. 6, *supra*. This error was sanctioned by the District Court's last minute omission of the instruction to the jury previously described; if given, it would have charged the jury that, in determining the fair value of Troutman's services, the jury should give no weight to the value of the "result" to Southern, but could consider the "result" only so far as it might demonstrate that Troutman performed efficiently. P. 8, n. 5, *supra*.[12]

Without the instruction, the jury was free to give full weight to Troutman's testimony, and that of other witnesses, which supported the request for $175,000 relying importantly upon the result. See p. 6, n. 4, *supra*. The jury's award of that amount for what at most could have been about sixty days' work, assuming Troutman worked every day between July 20 and September 19, 1963, represents almost $3,000 a day. The total sum can scarcely be conceived as anything other than a fee based on the favorable outcome and the ultimate savings to Southern. The case thus presents in sharp focus the question whether the prohibition of fees contingent on a favorable result can be

[12] When the omission of the instruction was criticized as error in the Court of Appeals, Troutman objected that that point had not been saved because Southern made no further objection to the omission after the charge to the jury was delivered. However, since Southern's wish for the instruction had been made clear to the District Judge at the pre-charge conference, no further objection after the charge was necessary or useful. See *Meitz* v. *Garrison*, 413 F.2d 895 (8th Cir. 1969). Alternatively, given this Court's governing decisions, omission of the charge would constitute plain error appropriate for review even if the District Judge had never been apprised of Southern's position. See *Edward* v. *Mayes*, 385 F.2d 369 (4th Cir. 1967).

avoided merely by awarding a "reasonable fee" measured in large part by that result.

The essence of contingent fees, from the viewpoint of this Court's decisions limiting their use, is not the presence of a particular fixed percentage of recovery nor in the possible contrivance of the fee to deny all compensation if the Federal Government fails to comply. The danger lies in an arrangement which has the effect of promising a substantially greater reward to the agent if he succeeds and which thus introduces a temptation deemed inadmissible in the conduct of a wide range of official federal business. Given that this Court's decisions would void a contingent promise to pay Troutman $175,000 for securing the intervention of the President, it is hard to conceive any rational basis for allowing a jury to inflate markedly his "reasonable fee" to that figure on the assumption he secured such a result.

The conflict with this Court's decisions is heightened because in *Hazelton* v. *Sheckells,* 202 U.S. 71 (1906), the Court actually determined that an arrangement having the effect of a contingent fee for procuring government action would not be upheld even though the form of arrangement did not precisely resemble a contingent fee as such. The case involved an option to purchase property which operated in practice to provide the agent a larger reward depending on his ability to accomplish Congress' purchase of the land for more than a certain sum. Declining to enforce the option, Mr. Justice Holmes declared "that the conveyance was in substance a contingent fee." 202 U.S. at 78.

As recently as 1961, this Court had occasion, in discussing the procurement of government contracts, to refer to the "evils which flow from contingent fee ar-

rangements." *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 550 (1961). The Court there cited with approval its decisions in *Hazelton*, *Oscanyan*, and *Norris*, cases which have been relied upon above.[13] If the judgments below in this case stand, the Court's restrictions on contingent fees in connection with Federal Government operations can be circumvented hereafter merely by stipulating for a "reasonable fee" measured by the result. Such a change in long-established policy should by itself warrant plenary review in this Court.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

CHARLES A. HORSKY
MICHAEL BOUDIN
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorneys for Southern Railway Company

Of Counsel:

EARLE B. MAY, JR.
4th Floor, Haas-Howell Bldg.
Atlanta, Georgia 30303

June 1971

---

[13] In addition, the decision in *Mississippi Valley* quoted the following passage from the *Hazelton* case which, while directed particularly to contingent fees, is equally relevant to the use of personal or political influence: "The objection to them [contingent fees] rests in their tendency, not in what was done in the particular case. . . . The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear."

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30625

ROBERT B. TROUTMAN, JR., *Plaintiff-Appellee,*

v.

SOUTHERN RAILWAY COMPANY, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Georgia

(April 16, 1971)

Before WISDOM, Circuit Judge, DAVIS,* Judge, and GOLDBERG, Circuit Judge.

WISDOM, Circuit Judge: Robert B. Troutman, Jr., a member of the State Bar of Georgia, brought this diversity action against the Southern Railway Company seeking to recover the sum of $200,000 as the reasonable value of legal services rendered to Southern in two separate matters—the Central of Georgia case[1] and the grain rate case—dur-

* Judge Oscar H. Davis, United States Court of Claims, Washington, D. C. sitting by designation.

[1] In 1962 Sim S. Wilbanks, representing Southern, came to Troutman's law office to ask him to help Southern with the Interstate Commerce Commission in connection with Southern's purchase of the Central of Georgia Railroad. After the successful completion of the matter, Troutman advised Wilbanks that Southern could settle its obligations to him by joining with Troutman to develop certain air rights. The air rights owned by Troutman adjoined property owned by Southern and the Central of Georgia in Atlanta; in Troutman's opinion a joint development of these air rights would have been mutually profitable to both parties. Negotiations over the air rights were still pending when Wilbanks again approached Troutman to seek his aide on behalf of Southern, this time in the grain rate case.

ing the years 1962 and 1963. On Southern's motion for summary judgment, the district court ruled that Troutman's claim with respect to the Central of Georgia matter was barred by the Georgia four-year statute of limitations. *Troutman* v. *Southern Ry. Co.*, N.D. Ga. 1968, 296 F. Supp. 963. Troutman took no appeal from that ruling, and the Central of Georgia matter has dropped out of the case. A jury awarded Troutman the sum of $175,000 as the reasonable value of his services in the grain rate case. We affirm.

I.

In 1963 the Interstate Commerce Commission issued an order directing Southern to increase certain rates on grain shipments from the Midwest to the Southeast by approximately 16 percent. The order created a difficult situation for Southern: if allowed to stand, the order, according to Southern, would result in its losing a $13,000,000 investment in "Big John" railroad cars plus a "tremendous" loss of revenue in the future. Sim S. Wilbanks, a vice president and assistant to the president of Southern, turned for help to Troutman, who had only recently come to Southern's aid in the Central of Georgia case. Troutman, an Atlanta attorney, had no experience in I.C.C. matters, but he was known to Wilbanks as a personal and political ally of President John F. Kennedy. Wilbanks told Troutman that Southern was filing suit in a federal district court in Ohio to enjoin the order of the I.C.C. He asked Troutman to persuade the President and the Department of Justice, then headed by the President's brother, Robert F. Kennedy, to "ditch" the I.C.C. and enter the case on the side of Southern. What Wilbanks actually told Troutman, what he engaged Troutman to do, and what Troutman eventually did are of course the crucial issues in this case, and we shall deal with them later in this opinion. Troutman's efforts were successful: The Department of Justice filed an answer in the Ohio lawsuit opposing the I.C.C. and supporting Southern's position. As a result of the Ohio liti-

gation (in which Troutman played no further part), the I.C.C. order was struck down. In return for Troutman's services (in connection with the Central of Georgia case as well as the grain rate case) Southern agreed to look into the joint development of air rights that Troutman owned on property in downtown Atlanta adjacent to property owned by Southern. Efforts to work out the joint development of the air rights continued for several years. When it became apparent, however, that Southern would not join in the development of the air rights, Troutman demanded compensation for his services in the grain rate case in "the usual manner"—i.e., by the payment of money. When Southern refused to pay, Troutman filed suit.

Southern defended the action on three grounds: (1) that Troutman's claim was barred by the Georgia four-year statute of limitations; (2) that Troutman's activities on behalf of Southern were not legal services and were gratuitously rendered; and (3) that because of the nature of the services rendered, it would be contrary to public policy to enforce a claim for compensation. On these grounds Southern moved for the entry of summary judgment in its favor. The district court denied the Motion, *Troutman* v. *Southern Ry. Co.*, N.D. Ga. 1968, 296 F. Supp. 963, and a jury returned a verdict for Troutman in the amount of $175,000. The court denied Southern's motion for judgment notwithstanding the verdict or for a new trial, and Southern appealed.

II.

Southern's first contention is that the district court erred in refusing to grant Southern's motion for judgment notwithstanding the verdict because the evidence conclusively establishes that the contract upon which Troutman sued was "to exert his personal and political influence upon the President of the United States." Southern argues that such a contract is in violation of public policy and unenforceable; therefore, the court erred as a matter of

law in failing to render judgment for Southern. We cannot agree.

It is of course true that a contract to influence a public official in the exercise of his duties is illegal and unenforceable when that contract contemplates the use of personal or political influence rather than an appeal to the judgment of the official on the merits of the case. *See, e.g., Oscanyan* v. *Winchester Repeating Arms Co.,* 1881, 103 U.S. 261, 26 L.Ed. 539; *Providence Tool Co.* v. *Norris,* 1865, 2 Wall. 45 17 L.Ed. 868; Annot., 148 A.L.R. 768; Annot. 46 A.L.R. 196. Nevertheless, all citizens possess the right to petition the government for redress of their grievances. United States Constitution, Amendment I. To that end, one may employ an agent or attorney to use his influence to gain access to a public official. Moreover, once having obtained an audience, the attorney may fairly present to the official the merits of his client's case and urge the official's support for that position. *E.g., Hall* v. *Anderson,* 1943, 18 Wash. 2d 625, 140 P.2d 266, 148 A.L.R. 760; *Old Dominion Transportation Co.* v. *Hamilton,* 1926, 146 Va. 594, 131 S.E. 850, 46 A.L.R. 186. As the district court well stated in its opinion overruling Southern's motion for summary judgment, it is "only the elements of 'personal influence' and 'sinister means' [that] will void the contract and deny it enforcement." *Troutman* v. *Southern Ry. Co.,* N.D. Ga. 1968, 296 F. Supp. 963, 972. *See also Coyne* v. *Superior Incinerator Co.,* 2 Cir. 1936, 80 F.2d 844; *Meadow* v. *Bird,* 22 Ga. 246; *Cary* v. *Neel,* 54 Ga. App. 860, 189 S.E. 575. Moreover, the illegal or sinister nature of a contract for professional services will not be presumed; the burden of proving the illegality of the contract is clearly upon the party asserting it. *Steele* v. *Drummond,* 1927, 275 U.S. 199, 72 L.Ed. 238; 17A C.J.S. Contracts § 585.

It necessarily follows then that the decision whether to enforce a claim for compensation for these kinds of legal services will depend largely upon the facts of each case. *See Noble* v. *Mead-Morrison Mfg. Co.,* 1921, 237 Mass. 5,

129 N.E. 669; 17 Am. Jur. 2d Contracts § 211. Whether the parties in fact entered into a contract calling for the improper exercise of personal influence upon a public official is therefore a question for the jury, guided of course by proper instructions. *Old Dominion Transportation Co.* v. *Hamilton,* 1926, 146 Va. 594, 131 S.E. 850, 46 A.L.R. 186; *cf.* 3 A. Corbin, Contracts §§ 534, 554. In this case the jury concluded that Troutman had agreed with Southern to use his influence merely to gain access to the President and present to him the merits of Southern's case; therefore, the contract was valid and enforceable. On appeal from the order of the district court denying Southern's motion for judgment notwithstanding the verdict, it is our task to examine the record to see whether substantial evidence supports the jury's conclusion. *See Boeing Co.* v. *Shipman,* 5 Cir. 1969, 411 F.2d 365, 374-75 (en banc).

Troutman himself testified that Wilbanks asked him to go to the President and persuade him "to listen to the case and to see if [the I.C.C.'s order] was not truly against the national interest of this country." He testified that Wilbanks did not ask him to use personal or political influence to get the President to do something for that reason alone. Because he was convinced of the merit of Southern's position, Troutman went to Washington and talked with the President, the President's Special Deputy Counsel Myer Feldman, the Assistant Attorney General William H. Orrick, Jr., and officials in the Department of Agriculture.

Feldman testified by deposition that upon being advised of the grain rate problem the President asked him to look into it and "to report back to him on the merits of the case." He said that Troutman supplied him with material helpful to an understanding of the issues and that their conversations dealt with what was in the best interest of the nation, the South, and the farm community. After carefully studying the matter, Feldman reported to the President that he thought that the I.C.C.'s order would adversely affect the economy of the South and therefore

was not in the national interest. Finally, Feldman testified that Troutman did not make any request of the President that Feldman considered in any way improper; he did not consider it improper to bring the grain rate case to the attention of the President.

Orrick testified, also by deposition, that he and his staff studied the legal questions and that the decision of the Department of Justice to file an answer in the Ohio court contrary to the position of the I.C.C. was based entirely on the merits of the case, unaffected by any outside influence. He also stated that it was not unusual for an attorney to call upon him for the purpose of presenting to him, as an Assistant Attorney General, the contentions, both legal and economic, of the attorney's client; and such activities come within the general scope of the performance of legal services for the client.

From this evidence we conclude that a jury could reasonably find that Troutman was employed to use his influence, such as it was, merely to obtain an audience with the President and there to present to him the merits of Southern's position. Such an employment contract is not in violation of public policy and is therefore enforceable. It follows then that the district court did not err in refusing to grant Southern's motion for judgment notwithstanding the verdict.

III.

Second, Southern contends that the court erred in admitting as rebuttal evidence Southern's answers to certain interrogatories concerning its employment in the grain rate case of former Georgia Governor S. Ernest Vandiver. This contention is also without merit.

The admission of rebuttal evidence is within the discretion of the district court. The Vandiver interrogatories showed that Southern had paid Vandiver for services in the grain rate case similar to those Troutman had rendered

and that on its checks to Vandiver it had characterized those services as "legal services." Troutman, properly enough, sought to introduce the interrogatories to rebut Southern's argument that Troutman's activities on its behalf were not legal services and were rendered gratuitously. Moreover, they were useful in impeaching the testimony of the witness Wilbanks, who had answered evasively concerning Southern's relationship with Vandiver. In these circumstances we cannot say that the district court abused its discretion by admitting the interrogatories into evidence.

IV.

Southern's third argument is that in several particulars the court's instructions to the jury concerning contracts in violation of public policy were erroneous. In reviewing the trial court's instructions to the jury, we must consider the charge as a whole, in connection with the contentions made by the parties in the trial court, and from the standpoint of the jury. If the charge in general correctly instructs, then even though a portion is technically imperfect, no harmful error is committed. *Webster* v. *Sea Drilling Corp.*, 5 Cir. 1969, 411 F.2d 411, 413; *Grey* v. *First National Bank*, 5 Cir. 1968, 393 F.2d 371, 381; *Garrett* v. *Campbell*, 5 Cir. 1966, 360 F.2d 382, 386. Considered as a whole, the court's instructions, set out in the margin,[2] cor-

---

[2] The relevant portion of the court's charge reads as follows:

> In this regard, I charge you that contracts contrary to public policy, that is, those which tend to be injurious to the public or against the public good, are illegal and void, even though actual injury does not result therefrom. In this category, and purely by way of illustration, such a contract which would violate public policy would be, for instance, a contract to buy legislation or to obstruct justice, or to tamper with a jury, or to bribe a judge. Such a contract would be utterly void and would not be enforced by the courts, and will not be enforced by the courts, either directly or indirectly.
>
> Now the law does not attempt to categorically or exhaustively define the phrase "contrary to public policy," or to specify

rectly state the law concerning contracts in violation of public policy.

V.

Southern's final contention is that the district court erred in refusing to grant its motion for a new trial on the

---

with particularity every type of contract which does or does not fall within this prohibition. Many contracts affecting the public are clearly valid. Some are clearly void. Still others may or may not be, depending upon the circumstances. Among those filling within the latter group, the law lays down no arbitrary rule, but wisely leaves it to the jury to decide the validity of the particular contract under the facts of each case.

I charge you, however, that there are certain well defined principles which a jury should consider in arriving at its conclusion as to whether a particular contract is or is not void for this reason.

In each case, for example, the test for any, for any contract, as to whether it is or not against public policy, must be measured by its inherent tendencies, and if those tendencies be bad, the legality of the contract cannot be saved merely by the good faith of the contracting parties.

Nor does it matter whether efforts to carry out such a void contract have met with success or failure, or whether any evil in fact resulted by or through the agreement.

Now, in order to render a contract void as contrary to public policy, there must be some attendant sinister suggestion that goes to the very heart of the undertaking. Thus, a mere incidental or collateral act of illegality in performing under a contract will not render an otherwise valid and lawful contract unlawful, but if both the innocent and the corrupt aspects of the agreement, or the performance thereunder, be so hopelessly intertwined as to taint the entire contract or stain the entire fabric, then the whole contract must fall.

I charge, you also that in every case, Ladies and Gentlemen, the invalidity of a contract as violating public policy must be proved, and detriment to the public will never be presumed where nothing sinister or improper is done or contemplated. Thus, if a contract be one which by its terms can be performed in a lawful manner, the presumption is that it will be so performed, at least until the contrary appears. But even so,

ground that the jury verdict was excessive. In *Baker* v. *Dillon*, 5 Cir. 1968, 389 F.2d 57, this Court said,

> It is a well-established rule of this Court that the granting or denial of a new trial on the ground of excessive

---

if a subsequent performance or attempted performance under the contract should itself involve conduct clearly contrary to public policy, then the person suing to enforce the contract may still be denied a recovery thereunder.

In the final analysis, Ladies and Gentlemen, if a contract is to be held to violate public policy, it is the illegality of the conduct of the person seeking to enforce the contract, either in entering into the agreement in the first place, or in performing it thereafter, which is the true ground, if any, for denying recovery.

It will be your duty, Ladies and Gentlemen, to apply these principles to the facts of this case as shown by the evidence. In this regard, I charge you that contracts to influence public officers in the performance of their duties may or may not be contrary to the public policy, depending first on what was contracted to be done, and second, on what actually was done in furtherance of such an agreement. Thus, one may contract to use his personal connections or influence merely to gain access to a public official, or to obtain an audience with him, and such contract is clearly legal and permissible. Otherwise, many perfectly innocent citizens would be deprived of an opportunity to have the merits of their case considered.

Moreover, having gained an audience with a public official, one may agree, for hire, to urge the support of such public official for a, in favor of a certain position by furnishing to him facts or law or even theories, provided always that in the final analysis such facts or laws or theories are presented and are to be presented on their merits, and only for what they may be worth.

I charge you, Ladies and Gentlemen, that on the other hand, it is illegal to contract to influence the conduct of a public official on any other basis. Specifically, Ladies and Gentlemen, I charge you that it is illegal to agree for hire to bring personal or political influence to bear on a public official, and to seek action or a decision from him on the basis thereof, when it's done irrespective of and without regard to the merits of the case. Such an agreement, Ladies and Gentlemen, would be patently in violation of public policy and would be absolutely void and unenforceable.

> or inadequate damages is a matter of discretion with the trial court, not subject to review except for grave abuse of discretion.

Id. at 58. In the circumstances of this case the court did not abuse its discretion by denying Southern's motion for a new trial. The jury's verdict is supported by the evidence.

Therefore, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 11210

ROBERT B. TROUTMAN, JR.

v.

SOUTHERN RAILWAY COMPANY

[Dated: December 20, 1968]

Order

In this action, which seeks to recover monies allegedly due for services rendered, the defendant, Southern Railway, has filed a motion for summary judgment.

The action is brought by an attorney at law on two separate transactions. The first may be referred to as the "Central of Georgia matter", and the second as the "grain rate matter". The complaint makes no breakdown as to the amount claimed for each transaction. Both are for services rendered, however, in one instance for work before the Interstate Commerce Commission (in the Central of Georgia matter) and in the other before the President of the United States and the United States Department of Justice (in the grain rate matter).

The defendant's motion for summary judgment is based on a claim that the contracts made and the services rendered, under the undisputed facts, were in furtherance of a scheme to influence the conduct of public officials and contrary to public policy so that compensation therefor cannot be recovered in the courts. As to the Central of Georgia transaction, the defendant also moves for summary judgment on the further ground that the claim is barred by the four-year statute of limitations contained in Georgia Code § 3-711.

In finding the facts, the court has relied exclusively upon statements made by the plaintiff himself either in an affidavit filed by him or in letters admittedly written by him. Perhaps this is a unique approach, for normally, of course, an opposing affidavit does not aid a movant in summary judgment. The courts recognize, however, that he should have any support it affords (*Dixon* v. *A.T.&T. Co.*, 159 F.2d 863 (2d Cir., 1947); *Chan Wing Cheung* v. *Hamilton*, 198 F. Supp. 154 (D. R.I., 1961), aff'd. 298 F.2d 459 (1st Cir., 1962)), and under the peculiar facts here, the court concludes that unless the plaintiff's own version of the transaction shows he cannot recover, the motion for summary judgment must be denied.

Having made this preliminary statement, the court finds the facts to be as follows:

During and prior to 1962 plaintiff (a licensed attorney at law in the city of Atlanta, was interested, through a corporation controlled by him, in certain "air rights" above the tracks of the Western & Atlantic Railroad in downtown Atlanta. The defendant Southern Railway was the owner of certain similar rights over its tracks in downtown Atlanta and adjacent to those owned or controlled by the plaintiff. The plaintiff was very much interested in developing these rights and also was desirous of entering into a joint venture of some character with the defendant whereby the adjacent air rights would be developed as part of a single undertaking.

Some time prior to 1962 the defendant Southern Railway had filed an application with the Interstate Commerce Commission for permission to purchase the Central of Georgia Railroad for a price of some $30,000,000. Similar approval had already been obtained from the Georgia Public Service Commission, but action by the ICC had not been forthcoming, although the application had been pending before that body for some two years.

In October of 1962 a vice president (and the assistant to the president) of the defendant, a Mr. Sim Wilbanks, came to see the plaintiff about the critically long delay by the ICC in passing upon the Central of Georgia purchase by defendant. Wilbanks asked plaintiff if he could "help Southern Railway expedite action by the ICC." The plaintiff indicated that he would be willing to help if he could and mentioned to Wilbanks that he, plaintiff, had already been talking with the president of defendant (Brosnan) about a joint development of the air rights project. On October 21, 1962, plaintiff went to work in an effort to help the Southern expedite action with respect to its acquisition of the Central of Georgia. He first discussed the matter with the Georgia Public Service Commission. Thereafter, he went to Washington and met with Commissioners Murphy and Tucker of the ICC "to determine why action had not been taken. . . ." On October 29, 1962 he again conferred with Commissioners Murphy and Tucker and presented "facts which I had obtained as to the urgency of the matter." (Troutman affidavit, pp. 2, 3.)

Largely through his efforts, as plaintiff contends, the ICC on November 8, 1962 approved Southern's application for acquisition of the Central of Georgia "subject to the Commission being assured of Southern's ability to obtain the necessary funds on reasonable terms. . . ." (Troutman affidavit, p. 3.)

To continue with plaintiff's affidavit, he says that:

> "Several days later Mr. Wilbanks came to my office and discussed Southern's obligation to me for my serv-

> ices in the Central of Georgia case. I told Mr. Wilbanks that Southern could settle its account with me for my services in that matter by entering into an arrangement for joint development of the air rights properties. Mr. Wilbanks approved that method of settlement and stated that he would go to work on the matter with the proper officials of his company and that I could expect early attention from them." (Troutman affidavit, p. 4.)

Several months then passed with no further contact between the parties and, so far as appears, no further work was ever done by plaintiff with respect to the Central of Georgia transaction, and apparently none was required or expected.

Thereafter, on July 2, 1963, Wilbanks telephoned the plaintiff, saying he wanted to see him and would come to Atlanta. He came about two weeks later and stated that he very much needed plaintiff's help again and upon another matter, whereupon plaintiff says:

> "I told Mr. Wilbanks that I was quite displeased over Southern's non-action in going forward with us in the air rights undertaking and that therefore I was not interested in again helping Southern with another one of its problems." (Troutman affidavit, p. 5.)

Wilbanks then recounted to plaintiff what Southern's new problem was. To summarize, he stated that Southern had undertaken a project for hauling grain from the Midwest into the South in multiple carload lots, and that in anticipation of a large volume of traffic, it had not only reduced its rates on grain by 60%, but had also purchased many millions of dollars of "Big John" cars for the purpose of hauling the grain. He recounted further that on July 15th, after these commitments were made, Southern had been served with an order by the ICC cancelling Southern's reduction in grain rates effective as of August 26,

1963, thereby jeopardizing the whole program, including Southern's investment. Wilbanks urged to plaintiff that the ICC action was strongly contrary to the public interest, particularly in the Southeast, and was in violation of law. He also told plaintiff that the Southern had filed suit in federal court in Cincinnati, Ohio to have the cancellation order of the ICC set aside. Mr. Wilbanks then stated to plaintiff that:

> "Southern Railway wanted the facts in this case brought to the attention of President Kennedy and that they (Southern) wanted to persuade the United States Department of Justice as to the legal merits of Southern Railway's position in the case so as to persuade the Department not to support the position of the ICC in the matter but instead to support Southern Railway's position." (Troutman affidavit, p. 6.)

Plaintiff thereupon asked Mr. Wilbanks

> "... what he wanted me to do and he said he wanted me to discuss the matter with President Kennedy because of the public interest phase of the case and to seek the President's interest in the matter and to try to get the Department of Justice on Southern's side of the controversy,"

pointing out that the cancellation order, if effective, would cost the livestock and poultry interests in the South millions of dollars per year.

Plaintiff then told Wilbanks that despite his displeasure with Southern's failure to cooperate in the air rights matter, he would help in the grain rate matter if convinced as to the merits of Southern's position. He also asked Wilbanks to furnish him with a statement of Southern's position, and a statement thereof was sent to him by Wilbanks on July 26th. Plaintiff says he told Wilbanks he would help "because it seemed to me that Southern's position had merit." The material sent by Wilbanks included the suit papers filed in the Cincinnati case and a legal

memorandum setting out why the order was contrary to law and to the public interest, in Southern's opinion. It also made a contention that the order was contrary to President Kennedy's message to Congress in connection with the National Transportation policy. (Troutman affidavit, pp. 7-8.)

Plaintiff then recounts the research which he did in acquainting himself with the matter, and then says in his affidavit that because of Southern's Railway's contentions, "I had no question as to the propriety of bringing the matter to the attention of President Kennedy, whom I had known for a number of years." (Troutman affidavit, p. 8.)

Thereupon, plaintiff made an appointment with President Kennedy, and with respect to what transpired, his affidavit says:

> "I . . . explained to him Southern Railway's rate reduction problem with the ICC and its lawsuit against the Commission and the United States. I pointed out to him the discriminatory aspects of the ICC's action and the potential benefit of reduced grain rates. . . ."

He says the President asked numerous questions, some of which plaintiff could answer and some of which he could not. He says, "The President then stated that he had not previously known of the problem but thought the idea of the Justice Department opposing the ICC was rather unusual." He says the President told him, however, that he would look into the matter and thereupon called a Presidential Assistant, a Mr. Feldman, of his staff. (Troutman affidavit, p. 9.)

After further research by the plaintiff, he returned to Washington and again met with the President, who stated to plaintiff:

> "That his legal staff had reported to him that in their opinion the ICC's ruling in the 'Big John' case was atrocious."

Plaintiff continues, that:

> "The President stated that his staff would now discuss the matter with the Justice Department staff, and he asked me not to begin discussion of the matter with the Justice Department until after their discussions had been undertaken."

The President also wanted to know the views and feelings of southern congressional leaders. (Troutman affidavit, pp. 10-11.)

After the plaintiff had met with numerous southern congressmen and senators he again met with President Kennedy and furnished the information which he had acquired. The President then told him that it was now timely for him to discuss the problem with those responsible for the case at the Justice Department, and thereafter he (plaintiff) called on Mr. Katzenbach, then Deputy Attorney General, who made an appointment for him with Mr. Orrick, the Department attorney handling the case. Plaintiff pointed out to Mr. Orrick the merits of Southern Railway's legal position as opposed to the position of the ICC. (Troutman affidavit, p. 12.)

On August 21st a temporary restraining order against the cancellation action had been granted by the United States District Court in the action filed in Cincinnati. So far as appears, plaintiff took no part in this proceeding.

During the week of September 15, 1963, plaintiff again met with the President, and his affidavit continues that:

> "On . . . September 18, 1963 President Kennedy told me that he understood that the Justice Department would make its appearance in the case the next day and would support Southern Railway's position in the grain rate case." (Troutman affidavit, p. 16.)

Thereafter, on September 19, 1963, the Department of Justice filed its pleading in the Cincinnati case which, as

plaintiff says, "had the effect, in substance, of taking the position of Southern Railway in the matter and not the position of the ICC." (Troutman affidavit, p. 17.) Apparently this solved Southern's problems.

Thereafter, on September 30th the plaintiff received from the president of Southern Railway a letter thanking him for his help, and on September 23, 1963, plaintiff returned to Washington and thanked the President for his interest and attention. (Troutman affidavit, pp. 18-19.)

Plaintiff's affidavit then states that:

> "Soon after the desired result was obtained . . . Mr. Wilbanks came to my office and thanked me again for the job I had done and said he wanted to discuss with me settling Southern's obligation to me for the services performed."

Plaintiff then told Wilbanks that he was still vitally interested in joint development of air rights as a means of settlement in lieu of cash, to which Wilbanks replied that he would again immediately undertake to bring about Southern's active interest in the project, his feeling being that in consideration of the fine job plaintiff had done, he would be able to convince the Southern Railway to go forward with it. (Troutman affidavit, pp. 19-20.)

Thereafter, so far as appears, nothing happened until March 3, 1965, when the President of the Southern Railway informed the plaintiff that Southern Railway had decided to proceed independently to develop its own air rights. Still later, on August 23, 1965, plaintiff wrote the president of Southern that thus far he (plaintiff) had treated his compensation and the air rights matter together, but that now he desired them separated so that each could stand on its own bottom. Thereafter, in late September, 1965, plaintiff had not had a reply to his letter of August 23rd addressed to the president of Southern. At that time Wilbanks came to see plaintiff, telling plaintiff that he (Wil-

banks) was disturbed to hear that plaintiff was displeased, to which plaintiff replied:

> "I told him that I was very much displeased, that as he well knew I had expected to be compensated . . . either by joining air rights or in cash." (Troutman affidavit, p. 22.)

On October 16, 1965, plaintiff received another letter from the president of Southern, saying:

> "I feel that it would be better for you and Southern to handle their two Atlanta air rights separately; however, if you have a different thought, I would be glad to know the details."

Thereafter, on June 27, 1967, plaintiff wrote to Wilbanks, indicating his intention to protect his rights to compensation and demanding payment "in money".

Still later, on August 28, 1967, plaintiff wrote Wilbanks, setting out plaintiff's position and saying, among other things:

> "First: Southern twice employed me as a lawyer to represent it—(a) to expedite ICC action on Southern's purchase of Central of Georgia, and (b) in getting the Department of Justice to side with Southern in a suit against ICC to uphold Southern's reduction of rates on grain shipments. . . ."

Plaintiff then recounts his efforts in Southern's behalf, after which the letter continues:

> "Third: Each case required extraordinary professional service and each time I was given major responsibility.
>
> "In the Central of Georgia purchase, the issue had been long pending before ICC, and others for Southern had tried and failed to get Commission action.

Since the matter had become critical, and since others had failed, unusually competent assistance was called for.

"In the 'grain rate' case, ICC on July 1 had issued its death-dealing order against Southern—to take effect in August. You told me that for Southern to succeed, it was of utmost importance to persuade the Justice Department to oppose (rather than defend) the ICC in federal court. Such opposition seemed to me incredible, but you told me of a precedent. Despite the precedent, however, it was evident that such an unusual action by the Justice Department would probably require specific direction of the President; and, on my direct question to you in my office, you admitted that you desired me to seek the President's intervention on Southern's behalf against the ICC. Unquestionably, obtaining such presidential action would be an extraordinary achievement."

In the same letter plaintiff recounts his efforts on behalf of Southern, both in studying the case and in discussing it with the President. He also recounts his discussions with agriculture commissioners and senators, and then says:

"These efforts led to the desired results from the Justice Department—(a) in opposing the August injunction, and (b) pleading on behalf of Southern in September."

During the period in question the Attorney General in charge of the Justice Department was Mr. Robert F. Kennedy, the brother of the President.

The letter ends by saying that:

"To protect my legal rights it may be necessary to institute legal action by September 20—the anniversary of the date that the Justice Department filed its pleadings in the 'grain rate' case."

Suit was filed on September 15, 1967.

Based on the foregoing facts, the court concludes that the claim for services rendered in connection with the "Central of Georgia matter" is barred by the four-year statute of limitations contained in Georgia Code § 3-711, and that, as to this claim, the motion for summary judgment should be granted.

With respect to this phase of the case, the evidence shows without dispute that the services rendered began in October, 1962, and were concluded on November 8, 1962. Obviously, both parties recognized that the work was complete at that time, and they in fact discussed the manner of payment. Not a scintilla of evidence suggests that anything was done or expected to be done after that date, and clearly the statute began to run in November of 1962. Since suit was not filed until September 15, 1967, this part of the claim is clearly barred, whether it be treated as sounding in quantum merit, *Cooper* v. *Claxton*, 122 Ga. 596, or otherwise, *Blackstock* v. *Murphy*, 220 Ga. 661, 662-3.

With this conclusion the court might well end its discussion of the Central of Georgia claim, except that plaintiff seeks to avoid this result by making these contentions: First, he says that the ICC approval of the Central acquisition on November 8, 1962 was only "conditional" in character and not final. It appears, however, that plaintiff was not employed to terminate the matter but merely to "expedite" it. It also appears that the only condition annexed to the ICC order was that the Commission be assured of Southern's ability to obtain the necessary funds on reasonable terms. Apparently these funds had already been arranged. At any rate, nothing was expected or performed by plaintiff in this regard, and it is not contended that the condition was not fulfilled in routine fashion and within a reasonable time. This excuse is rejected.

Second, plaintiff apparently seeks to tie the Central of Georgia transaction and the grain rate case together for

purposes of the statute of limitations. This appears from his letter of August 28, 1967, in which he says:

> "... To protect my legal rights, it may be necessary to institute legal action by September 20—the anniversary of the date that the Justice Department filed its pleadings in the 'grain rate' case."

It conclusively appears, however, that the two employments were entirely separate. In fact plaintiff himself has treated them so throughout. Thus, his complaint says in paragraph 2 that "Defendant employed plaintiff to perform services for it in two (2) separate matters. . . ." His letter of August 28th likewise makes reference to his being "twice employed", and throughout refers to the "initial employment" and the "second employment". It is also clear that when the first employment terminated neither party knew or dreamed there would ever be a second employment. On the contrary, they considered the employment at an end and actually discussed compensation for the Central of Georgia matter at that time. This contention is likewise without merit.

Finally, plaintiff says that the defendant is estopped to defend on the statute of limitations by reason of its having led plaintiff to believe that he would be paid for his services in the Centrol of Georgia matter not in cash, but by having defendant join with plaintiff in developing their respective air rights. Apparently plaintiff thereby seeks to bring himself within the provision of Georgia Code § 3-807, which provides that:

> "If the defendant . . . shall have been guilty of a fraud by which the plaintiff shall have been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud."

It has been uniformly held, however, that this section requires active, actionable fraud involving moral turpitude

before the statute will be tolled. *Bank of Jonesboro* v. *Carnes,* 58 Ga. App. 193, aff'd. 187 Ga. 795; *Anderson* v. *Gailey,* 33 F.2d 589, 592; *Stephens* v. *Walker,* 193 Ga. 330.

Simply put, the facts here show no actual fraud. The very most they show is that plaintiff very much desired to tie in his compensation with a joint venture in developing air rights and that the defendant, at best, only promised to "consider" such a proposal. Promises to consider are like promises to pay—they are sometimes broken—but such a breach ordinarily and under the facts of this case, even if shown, falls far short of establishing actual fraud. Moreover, it appears that the defendant did "consider" such a proposal and that as early as March 3, 1965, the president of Southern Railway informed plaintiff that the railway "had decided to proceed independently to develop its own air rights." The same statement was made in Southern's letter of October 16, 1965, more than one year before this suit was filed. It thus conclusively appears that if plaintiff was deterred at all by these air rights negotiations, the deterrent was removed at a time when he still had more than one year within which to bring suit and that he failed to do so. As American Jurisprudence says:

> "... [W]here the inducement for delay or the hindrance to the commencement of an action has ceased to operate before the expiration of the limitation period, so as to afford the plaintiff ample time thereafter in which to institute an action prior to the running of the statute, he cannot excuse his failure to do so on the ground of estoppel." 34 Am. Jur., *Limitation of Actions,* § 412.

The motion for summary judgment as to the Central of Georgia matter is GRANTED. Since the court has concluded that it is barred by the statute of limitations, it is not necessary to consider whether, in this instance, the employment was likewise contrary to public policy.

The right of plaintiff to claim compensation for services rendered in the "grain rate case" presents a more complex question.

In this regard it may be noted that the practice of seeking personal and political favors from kings and public officials is a sport as old as government itself—and, within certain limits, there appears to be nothing wrong with it. It is sanctioned by history, and in one instance is virtually invited by the last clause of the First Amendment to the Federal Constitution. It has built railroads and launched fleets. In Spain it is reputed to have made financially possible the discovery of this continent. In England, Spain and France, to some degree and in one way or another, it led to the founding of every colony in the New World. But in one respect, personal or political influence is like virtue; it must not be sold. And if it is sold, or even contracted for, the courts may not and will not enforce the bargain.

This much is clear. But what is political influence? To simply furnish facts or law or even theories to an official to be considered on their merits is clearly not prohibited. To seek action based on facts so furnished may or may not be. To seek favors irrespective of the facts clearly is. In this area, the line between what is permissible and what is not is frequently dim. Often a decision has to be based on inference alone, and the question is usually one of fact. Numerous authorities might be cited, but since the court has decided that on this point the motion for summary judgment must be denied in any event, only a few will suffice.

Thus, in stating the existence of such a public policy, the Supreme Court of the United States (in a case involving Georgia citizens) has said:

> "Agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest or with duties of a fiduciary capacity to private parties, are against the policy of the State to secure fidelity in the discharge of all such duties and are void." *Woodstock Iron Co.* v. *Richmond & D. Extension Co.*, 129 U.S. 643, at 644.

Again in *Scott* v. *Beams*, 122 F.2d 777, 784, cert. den. 315 U.S. 809, the rule is stated as follows:

> "A contract which by its inherent tendency is inimical to public welfare or inconsistent with good morals violates public policy and will not be enforced, either directly or indirectly. The validity of a contract in point of being against public policy must be measured by its inherent tendency, not the good faith of the contracting parties or the manner in which they carried it out. And the success or failure which attends the fulfillment of a contract tainted with trespass upon public policy is without moment. The comprehensive doctrine is of such long standing and wide familiarity that it cannot be necessary to review the cases without number in which a great variety of contracts have been uniformly overturned. It is equally well settled that an agreement relating to a suit or proceeding in court which invites or promotes interference with full and impartial justice therein violates public policy and will not be enforced in any manner, though no actual corruption is involved."

On the other hand, not all such contracts fall in this category. As the Fifth Circuit said (in reversing this court) in *Steele* v. *Drummond*, 11 F.2d 595:

> "We do not understand that an agreement to secure legislation for legitimate purposes, and in a legitimate manner, is against public policy, nor unless that agreement by its terms or by necessary implication requires performance of acts which are of a corrupt character, or which have a corrupting tendency. 6 R.C.L. 732."

The same case then went to the Supreme Court of the United States, 275 U.S. 199, 205, where the Court said in discussing public policy:

> "While the principle is readily understood, its right application is often a matter of much delicacy. It is

only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal. And it is a matter of great public concern that freedom of contract be not lightly interfered with. Baltimore & O. S.W. R. Co. v. Voigt, 176 U.S. 498, 505, 44 L. Ed. 560, 564, 20 Sup. Ct. Rep. 385. The meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. 1 Story, Contr. 5th ed. § 675; Pope Mfg. Co. v. Gormully, 144 U.S. 224, 233, 36 L. Ed. 414, 418, 12 Sup. Ct. Rep. 632. It is only in clear cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice. Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 387, 45 So. 761; Barrett v. Carden, 65 Vt. 431, 433, 36 Am. St. Rep. 876, 26 Atl. 530; Richmond v. Dubuque & S. City R. Co., 26 Iowa 191, 202; Egerton v. Brownlow, 4 H.L. Cas. 1, 122, 10 Eng. Reprint, 359, 24 End. Rul. Cas. 118; Richardson v. Mellish, 2 Bing. 229, 242, 252, 130 Eng. Reprint, 294. Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated. Valdes v. Larrinaga, 233 U.S. 705, 709, 58 L.Ed. 1163, 1165, 34 Sup. Ct. Rep. 750."

The Georgia authorities (important in a diversity case) seem to be more in accord with the latter citations. They hold, in substance, that contracts to influence government officials are not void merely upon an appearance before the official to make arguments upon the merits of a question, and that only the elements of "personal influence" and "sinister means" will void the contract and deny it enforcement. *Meadow* v. *Bird*, 22 Ga. 248. See also *Cary* v. *Neal*, 54 Ga. App. 860.

Finally, see *Old Dominion Transportation Co.* v. *Hamilton,* 146 Va. 594, 131 S.E. 850, 857, where the Court said:

> ". . . [E]ven if the jury believed from the evidence that either personal or political influence was exerted by the plaintiff, but merely to secure a hearing from the city authorities, and an opportunity to present the matter in issue upon its merits, and that when such opportunity was secured the case was presented upon its merits and upon its merits alone, then in that event the jury should have been told that the plaintiff was entitled to a judgment."

Here, the conduct of plaintiff might very well support a strong inference that plaintiff was seeking to influence the President to influence his brother to take an action favorable to plaintiff's client. A jury may draw such an inference, but on summary judgment this court cannot do so. On summary judgment, inferences are for juries, not for the court.

Under the facts, many questions remain unanswered. Unquestionably, the plaintiff presented memorandums of fact and law to the President. Did he present the matter solely on its merits, or did he also ask the President, for some other reason, to intercede with his brother, who was Attorney General? Or did he do both? What was he employed to do? All of these questions will have to be submitted to a jury under proper instructions. See the instruction recommended by the Virginia Court of Appeals in *Old Dominion Trans. Co.* v. *Hamilton,* supra.

As to this aspect of the case, the motion for summary judgment is DENIED.

This 20th day of December, 1968.

/s/ NEWELL EDENFIELD
Newell Edenfield
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30625

D. C. Docket No. CA 11,210

ROBERT B. TROUTMAN, JR., *Plaintiff-Appellee,*

versus

SOUTHERN RAILWAY COMPANY, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Georgia

Before: WISDOM, Circuit Judge, DAVIS,* Judge, and GOLDBERG, Circuit Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

April 16, 1971

Issued as Mandate:

---

* Judge Oscar H. Davis, United States Court of Claims, Washington, D. C. sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30625

ROBERT B. TROUTMAN, JR., *Plaintiff-Appellee,*

versus

SOUTHERN RAILWAY COMPANY, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Georgia

On Petition for Rehearing and Petition for Rehearing en Banc

(Opinion Apr. 16, 1971, 5 Cir., 1971, — F.2d —)

(May 18, 1971)

Before: WISDOM, Circuit Judge, DAVIS,* Judge, and GOLDBERG, Circuit Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

---

* Judge Oscar H. Davis, United States Court of Claims, Washington, D. C. sitting by designation.

LIBRARY
SUPREME COURT, U. S.

70-339

Supreme Court, U.S.
FILED
JUL 22 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1886~~

SOUTHERN RAILWAY COMPANY,
Petitioner,

versus

ROBERT B. TROUTMAN, JR.,
Respondent.

On petition for writ of certiorari to the United States Court of Appeals, 5th Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Allen E. Lockerman
Counsel for Respondent
Troutman, Sams, Schroder
& Lockerman
3500 First National Bank Tower
Atlanta, Georgia 30303

TABLE OF CONTENTS

Page

Statement of the Case 1

Argument 9

I. There is no justification for the writ 9

II. There was no improper use of influence 10

III. There was no contingent fee 16

Conclusion 18

TABLE OF AUTHORITIES

Cases:

Arrow Transp. Co. v. Cincinnati, N.O. & T.P. Ry. Co., 379 U.S. 642 (1965) 11

Baker v. Dillon, 389 F.2d 57 (5th Cir., 1968) 18

Beard v. Westmoreland, 90 Ga.App. 632, 94 S.E. 2d 93 17

Black Industries v. Bush, 110 F. Supp. 801 (D., N.J. 1953) 15

Bradley v. American Radiator & Standard Sanitary Corp., 6 FRD 37 (S.D., N. Y., 1946) 15

Campbell County v. Howard, 133 Va. 19, 112 S.E. 876 17

Cary v. Neal, 54 Ga.App. 860, 189 S.E. 575 13

Coyne v. Superior Incinerator Co. of Texas, 80 F.2d 844 (2nd Cir., 1936) 15

Denver v. New York Trust Co., 229 U.S. 123, 133 (1913) 9

Ewing v. National Airport Corp., 115 F.2d 859 (4th Cir., 1940) 14

AUTHORITIES (Continued)

Page

Forsyth v. Hammond, 166 U.S. 506, 514-515 (1897) 9

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1938) 9

Gilchrist v. Harrah, 113 P.2d 712 (Cal.2d, 41) 16

Hall v. Anderson, 18 Wash.2d 625, 140 P2d 266, 148 ALR 760 13

Hamilton-Brown Shoe Co. v. Wolf Bros & Co., 240 U.S. 251, 258 (1916) 9

Magnum Import Co. v. Coty, 262 U.S. 159 (1923) 9

Moffett v. American Oil Co., 85 F.Supp. 174 (S.D., N.Y., 1949) 15

N.L.R.B. v. Waterman S.S. Co., 309 U.S. 206, 208 (1940) 9

Noble v. Mead-Morrison Mfg. Co., 237 Mass. 5, 1929 N.E. 669 13

Old Dominion Transportation Co. v. Hamilton, 146 Va. 594, 131 S.E. 850 14

Oscanyan v. Winchester Repeating Arms Co., 103 U.S. 261 (1881) 12

Providence Tool Co. v. Norris, 2 Wall. 45 (1865) 12

Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924) 10

Stanton v. Embrey, 93 U.S. 548 (1876) 13, 17

Steel v. Drummond, 275 U.S. 199, 205 (1927) 16

Trist v. Child, 88 U.S. 441, 451 ..... 12, 13

United States v. Johnston, 268 U.S. 220, 227 (1925) 9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1886

SOUTHERN RAILWAY COMPANY,
Petitioner,

versus

ROBERT B. TROUTMAN, JR.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner's Statement of the Case fails to give this Court a fair and impartial summary of the evidence sufficient for the Court properly to understand the issues. Thus, it is necessary that the respondent briefly but accurately supply the missing facts.

The respondent, a graduate of Harvard Law School, has been a practicing lawyer since 1941 (A. 148) and has been dependent on his law practice for ninety-five (95) per cent of his income. (A. 713). He first met Mr. Sim S. Wilbanks in 1962 when Mr. Wilbanks, rep-

resenting Southern Raiwlay Company, came to his law office to seek his assistance in helping Southern with the ICC in connection with its purchase of the Central of Georgia Railroad. (A. 173-75). After the successful completion of this matter, the respondent told Mr. Wilbanks that the Southern could settle its obligation with him "by joining with us to work out the air rights." (A. 180). The air rights owned by Mr. Troutman adjoined property owned by Southern and the Central of Georgia in Atlanta and in Mr. Troutman's opinion, a joint development of these air rights would have been mutually profitable to both parties. Thereafter, several fruitless conferences were held in this regard. (A. 181-82).

In July 1963, Mr. Troutman received a call from Mr. Wilbanks to set up another meeting in Mr. Troutman's law office, which took place about the middle of the month. (A. 182, 185). It was at that meeting that Mr. Wilbanks told him that the Southern "had an enormous problem" which had resulted from the Interstate Commerce Commission ordering an increase in grain freight rates which order, if allowed to stand, would result in the Southern losing a thirteen million dollar investment in Big John cars plus a tremendous loss of revenue in the future. (A. 185-88). Mr. Wilbanks explained to Mr. Troutman that the Southern was going to bring suit against the ICC because the order "violated the Interstate Commerce Commission Act," because the Commission "had gone beyond the powers that Congress had given it" and because the order was "against the national interest of this country." (A. 188-89).

Mr. Troutman testified that Mr. Wilbanks wanted him to present the matter to the President "to see if this was not truly against the national interest of this country." (A. 180). He categorically and emphatically denied being asked by Mr. Wilbanks to use personal or political influence to get the President to act for that reason, which Mr. Troutman would not "even have thought of doing." (A. 200, 249). After checking into the matter carefully, he concluded that Southern's position "had extreme merit in its favor" (A. 191, 196-99) and thereafter commenced his services.

There is little dispute with respect to what Mr. Troutman actually did in furtherance of Southern's request for his services. He had been furnished with material by Mr. Wilbanks initially and, according to Wilbanks, whenever Mr. Troutman would have a question "I'd send him something to answer it." (A. 491). Mr. Troutman conversed with the President several times, conversed several times with the President's Special Deputy Counsel, Myer Feldman (A. 204-05), did research at the Library of Congress and at the Census Bureau (A. 206-07) and conversed with the Georgia Commissioner of Agriculture and the United States Department of Agriculture, which department informed him that the reduction of grain rates "was in the national interest." (A. 210). The President wanted the reactions of certain congressmen (A. 214-15) and Mr. Troutman complied as best he could with that request. He studied the brief filed by the ICC in the Ohio suit to help him in his presentation of the case to the Department of Justice. (A. 226-27). At the suggestion of Mr. Feldman, he called Mr. Katzenbach, Deputy Attorney General,

who referred him to Mr. William Orrick of the Attorney General's office with whom he conferred several times and to whom he furnished material outlining the case in an attempt to convince him that the ICC had overstepped the law. (A. 229-30). He remained in almost daily contact with Mr. Wilbanks. (A. 519).

Mr. Feldman testified that the President was not familiar with the grain rate matter prior to Mr. Troutman's discussion of it with him and that the President asked him to look into it and to "report back to him on the merits of the case." (A. 638-39). Mr. Troutman gave Mr. Feldman material that would be helpful "in understanding the issues and in reaching a conclusion" and their discussions "dealt with what was in the best interest of (1) the United States and, (2), the Southern part of the United States, and, (3) the farm community." (A. 641-42). After carefully studying the matter Mr. Feldman reported to the President "that I thought the order would adversely affect the economy of the South and that therefore the ICC order was not appropriate in the national interest." (A. 645). Mr. Feldman made no effort to suggest to anyone in the Department of Justice what legal determination should be made in the matter; that determination was arrived at solely by the officials of that department. (A. 652).

Most significantly, Mr. Feldman swore that Mr. Troutman did not make any request of President Kennedy that he considered in any way improper (A. 653-54) and that he did not know of anything wrong with the facts concerning the grain rate case being brought to the attention of the President. (A. 652-53).

Mr. William Orrick, who was the member of the Department of Justice in charge of the matter, testified that his staff studied the legal questions and that the decision of the Department to file an answer in the Ohio litigation contrary to the position of the ICC was based entirely on the merits and was unaffected by any outside influence, including Mr. Troutman. (A. 659-60, 670).

Without objection, Mr. Orrick was permitted to testify that he was called upon from time to time by members of the Bar from the District of Columbia and various states for the purpose of presenting to him, as an Assistant Attorney General, the contentions, both legal, economic or otherwise, to support the position of those they were representing in cases in which the United States of America was a party, and that such activities come within the general scope of the performance of legal services for a party to a pending lawsuit. (A. 670).

The desired result — the filing of an answer by the Department of Justice supporting the position of the Southern — was accomplished on September 19, 1963. (A. 248-49). The next day, Wilbanks sent his "congratulations" and one week later wrote to "thank you again for the splendid work that you did in connection with our grain case. You did a masterful job for which we will always be grateful to you." (Pl's. Ex. 24, A. Vol. III, pp. 5-6; Pl's. Ex. 26, A. Vol. III, pp. 7-8). A few days later, Southern's President D. W. Brosnan

wrote to thank the plaintiff for his "tremendous help in connection with our grain case."[1]

Mr. Troutman's sworn denial of the use of personal or political influence[2] is *uncontradicted*. He did not even know Mr. Orrick (A. 249-50); he was not close to the Attorney General with whom he had clashed at a political convention. (A. 350).

When Mr. Wilbanks was asked whether he thought the President would have done what he did just because Mr. Troutman asked him, as compared to doing it on the merits, Mr. Wilbanks said that *"I think the President did it because Mr. Troutman asked him, and* the *merits* were *on our side."* (A. 538-39). Mr. Wilbanks further testified that he knew if Mr. Troutman went to the White House that he stood in such high regard with the President that the President would listen to

---

[1] Mr. Brosnan wrote further that "From every standpoint, moral or otherwise, it is only right that these low freight rates be permitted to stay in effect with great benefit to the people of Georgia and of all the Southeast." (Pl's. Ex. 25, A. Vol. III, pp. 6-7)

[2] "Q. Mr. Troutman, I want to ask you if at any time during the contacts that you had had with the President of the United States, President John F. Kennedy, as you have related them to this jury, did you ever ask President Kennedy to act in this matter as a personal or political favor —

A. I did not.

Q. — to you?

A. I did not.

Q. In presenting the facts to him, did you ever present them on any basis other than the merits of the case?

A. I did not. And I wouldn't even have thought of doing it.

Q. Would you have thought of asking the President of the United States to do you a personal or political favor in this matter?

A. I would not have." (A. 249).

him and that the material he gave Mr. Troutman could be used to persuade the President that the Southern was right. (A. 562).

There was no formal written agreement with respect to the services Mr. Troutman was to perform nor was there any formal fee arrangement. However, when the Justice Department's answer was filed, Mr. Wilbanks came to Mr. Troutman and asked "what could he do for me," and Mr. Troutman responded that the "account could be settled by Southern joining with us to develop the air rights." (A. 261). Mr. Wilbanks' testimony was that there was to be no compensation. (A. 488). He testified in substance that he had agreed to help Mr. Troutman by bringing to the attention of Mr. Brosnan Mr. Troutman's desire for a joint development of the air rights properties and that he had brought that matter to Mr. Brosnan's attention. It was brought out on cross examination, however, that Mr. Brosnan had testified in his deposition, taken in the presence of Mr. Wilbanks, that Mr. Wilbanks had never said anything to him about Southern's participation in the air rights project subsequent to November 8, 1962 (prior to the grain rate matter) and that he, Mr. Brosnan, would have remembered any such thing as that "if Mr. Wilbanks had brought it up, and he did not bring it up." (A. 568-70). Efforts to work out the joint development of the air rights were continued by Mr. Troutman for several years, but when it became evident that the Southern would not join in as Mr. Troutman had been led to believe, the plaintiff informed the defendant that the account would have to be settled in the "usual" manner by payment of

money. (A. 296) .The plaintiff discussed with Mr. Brosnan the fact that he expected to be paid. (A. 420). "Mr. Brosnan knew that I expected a compensation in the matter" and "Mr. Wilbanks knew that I expected compensation." (A. 425).

Mr. Troutman valued his services at $175,000.00 (A. 307). Three members of the Atlanta Bar valued the services as being worth from $195,000.00 to $260,000.00. (A. 464, 468, 726). The defendant did not offer any rebutting testimony.

Final proof that the position of the Justice Department was based on the merits of the case and not on personal or political influence came when the United States Supreme Court upheld the striking down of the ICC Order. (A. 276). Mr. Brosnan, Southern's President, again expressed his appreciation to Mr. Troutman for his services as he had done when the Justice Department filed its answer.[3]

Had the ICC order been allowed to remain in effect, the Southern's investment in "Big John" cars of more than twelve million dollars would have been lost. (A. 552). The revenue which would be lost was projected at "hundreds of thousands of dollars per month, millions of dollars per year." (A. 552). Primarily because of the successful results of the Ohio litigation, precipi-

---

[3] "We are, of course, quite happy at the decision and *I want to thank you again for your fine efforts which did so much to bring it about. Your assistance and interest will always be remembered* and *appreciated,* I assure you." (Pl's. Ex. 31, A. Vol. III, p. 13).

tated to a very large extent by Mr. Troutman's services, as admitted by Southern's President (Note 3, *supra*), Southern began a period of prosperity. (A. 554). *In one year alone (1966), Southern's operating revenues increased by over twenty-one million dollars.*

ARGUMENT

I. There Is No Justification For The Writ

Jurisdiction to bring up cases by writs of certiorari from circuit courts was conferred upon the Supreme Court for two purposes: (1) secure uniformity of decisions between those courts in the nine circuits, and (2) to bring up questions of unusual importance which it is in the public interest to have decided by a court of last resort. *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923). It is to be exercised sparingly, and when invoked for reviewing a question of importance, should not be exercised unless the question is of peculiar importance. See, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Forsyth v. Hammond*, 166 U.S. 506, 514-515 (1897); see also *Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913).

The Supreme Court does not grant certiorari solely to review judgments based solely on questions of fact, to review the evidence and discuss specific facts or to review the inferences drawn from the evidence. *N.L.R.B. v. Waterman S.S. Co.*, 309 U.S. 206, 208 (1940); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *United States v. Johnston*,

268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

Tested by these rules, it is clear that this Court's jurisdiction should not be invoked. The rulings below respecting the use of personal or political influence to procure governmental action are in complete accord with decisions by this and other federal courts as well as state courts. The argument that there was a contingent fee, which is being raised here for the firt time, involves only a failure to charge a technical point respecting the measure of recovery, which is not of sufficient gravity to be considered by this Court.

II. There Was No Improper Use of Influence

When Mr. Troutman was forced to file suit to recover compensation for valuable services rendered, the Southern for the first time urged that it had entered into a contract that was void as being contrary to public policy. Petitioner contended that it had asked Mr. Troutman to bring personal and political influence to bear upon the President of the United States.

This defense was first considered and rejected by the trial court which denied petitioner's motion for summary judgment. Petitioner sought without success to prove the illegal use of influence during the trial. The jury was instructed that "it is illegal to agree for hire to bring personal or political influence to bear on a public official, and to seek action or a decision from him on the basis thereof, when it's done irrespective of and without regard to the merits of the

case." (A. 774-75). The jury found from the evidence that there was no such illegality. This finding was approved by the trial court and subsequently by the Circuit Court.

By the very question posed by petitioner,[4] it is clear that even it has finally abandoned its original argument. The asking of the very narrow question admits that respondent was *not* hired to bring pressure to bear upon the President. It further admits that there was in fact *no* personal or political influence used to bring about the desired result. Admitted also is the fact that the position taken by the Justice Department was based purely and simply upon the merits, having in mind the welfare and best interest of the public.

In the present posture of the case, there is no suggestion that anything sinister, underhanded or detrimental to the public was considered or done.[5]

---

[4]The Circuit Court held that while a contract contemplating the use of personal or political influence to influence a public official is void, nevertheless it is permissible for one to employ an agent or attorney to use his influence to gain access to a public official for the purpose of fairly presenting the merits of his client's case. Petition for Writ of Certiorari; p. 4a.
The petitioner seeks a determination that the mere use of influence to obtain an opportunity to present the merits of a matter of great public importance is illegal.

[5]As rather conclusive proof that the merits of the matter were in favor of petitioner, the Court's attention is directed to its own approval thereof. See *Arrow Transp. Co. v. Cincinnati, N.O. & T.P. Co.*, 379 U.S. 642 (1965). Indeed, petitioner has steadfastly maintained that the reduction of grain freight rates would be of tremendous benefit to the public and especially the southeastern states.
Furthermore, Mr. Troutman swore that he was not asked to procure favorable action by the use of influence. (A. 200, 249). There is no hint of the actual use of influence contained in the transcript.

On the pretext of having this Court enforce long-standing principles prohibiting the sale of influence to procure or control official action, petitioner is actually seeking to deny private citizens of their right to be heard on the merits of their position through a prominent and well-respected attorney.

The rule to be gleaned from the reported authorities is summed up by Circuit Court as follows:

> "It is of course true that a contract to influence a public official in the exercise of his duties is illegal and unenforceable when that contract contemplates the use of personal or political influence rather than an appeal to the judgment of the official on the merits of the case."[6]

The leading cases relied on by petitioner[7] do not proscribe the hiring of an attorney who possesses personal or political influence, for indeed such a rule could destroy the livelihood of some of our country's leading advocates. What is prohibited is the use of such influence alone to achieve a given result in disregard of the merits and the public interest.

Every citizen has the right through an agent to be heard before any department or official of govern-

---

[6]Pet. for Writ of Certiorari, 4a

[7]*Trist v. Child*, 88 U.S. 441, 451; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261 (1881); *Providence Tool Co. v. Norris*, 2 Wall. 45 (1865)

ment.[8] Professional services to prepare and advocate just claims or other matters against the government for compensation are as legitimate as services rendered in court. See *Trist v. Child*, 88 U.S. 441 and *Stanton v. Embrey*, 93 U.S. 548 (1876). Part of an attorney's duty to his client is to "urge and persuade" which necessarily involves some personal influence.[9]

There is no doubt that the services actually rendered by respondent were those customarily furnished by an attorney to his client and sanctioned by the above authorities.

President Kennedy's Special Deputy Counsel, Myer Feldman, swore that there was nothing improper in Mr. Troutman presenting the matter to the President (A. 652-54). Deputy Attorney General William Orrick testified that he was called on from time to time by attorneys for the purpose of presenting data in support of their client's positions and that such activities came within the general scope of the performance of legal services. (A. 670). Senator Herman Talmadge and local attorney Hamilton Lokey both testified that his services were those routinely furnished by attorneys for clients. (A. 599-600, 723-25). Petitioner itself has impliedly if not expressly recognized that Mr. Troutman was hired to perform purely legal services rather than to use influence.[10]

---

[8] *Cary v. Neal*, 54 Ga.App. 860, 189 S.E. 575. Such activity carried on openly and straight forwardly by an attorney is proper basis for compensation, See *Noble v. Mead-Morrison Mfg.*, 237 Mass. 5, 129 N.E. 669.

[9] See *Hall v. Anderson*, 18 Wash.2d 625, 140 P2d 266, 148 ALR 760.

[10] Former Georgia Governor Ernest Vandiver was paid by petitioner

Perhaps the leading state case on the question is *Old Dominion Transportation Co. v. Hamilton*, 146 Va. 594, 131 S.E. 850. The plaintiff was employed to secure the cancellation of a lease from the City of New York. For the purpose of getting to see the Mayor, he armed himself with letters of introduction from influential politicians, without which "he would no more have had a chance to present his case to the Mayor of New York City, than he would have had to secure an audience with the Dalai Lama." The following appears at p. 857:

> "On the other hand, even if the jury believed from the evidence that either personal or political influence was exerted by the plaintiff, but *merely to secure a hearing from the city authorities, and an opportunity to present the matter in issue upon its merits, and that when such opportunity was secured the case was presented upon its merits alone*, then in that event the jury should have been told that the plaintiff was entitled to a judgment." [Emphasis added]

That decision has never been overturned or criticized, either by another state court or a federal court. On the contrary, it was cited approvingly in *Ewing v. National Airport Corp.*, 115 F.2d 859 (4th Cir., 1940),

---

for identical activities by a voucher marked for 'legal services.", (A. 503-05, 742-48).

and *Bradley v. American Radiator & Standard Sanitary Corp.*, 6 FRD 37 (S.D., N.Y., 1946).

The only federal court to comment specifically on the use of influence to secure a hearing is *Coyne v. Superior Incinerator Co. of Texas*, 80 F.2d 844 (2nd Cir., 1936).[11] Coyne had no expertise in selling incinerator plants but *he did have an acquaintance with public officials which would get him a hearing at least.* The possibility which this influence afforded to exercise improper pressure, in absence of proof of its use, was not enough to relieve defendant of its obligation to pay for services rendered (which, incidentally, was based on a percentage of the selling price).[12]

---

[11]The petitioner has implied that this question was also involved in the district court decision in *Moffett v. American Oil Co.*, 85 F.Supp. 174 (S.D. N.Y., 1949). A casual reading of that case reveals that the decision turned on the question of a lack of proof by plaintiff that his activities produced the claimed result. By way of dicta, the trial court concluded that the plaintiff was a *matter of fact* seeking a favor by means of personal influence irrespective of the merits. (This very question was resolved by the jury in favor of Mr. Troutman). At no point in its decision did the district court proscribe the use of influence solely to obtain the chance to present the merits.

The only time the *Moffett* public policy discussion has been cited by any other court was in *Black Industries v. Bush*, 110 F.Supp. 801 (D., N.J., 1953) wherein it was held to be inapplicable.

[12]The Second Circuit noted that "only when the paramount public interest requires it will a party who has received the benefit of the performance of a contract be permitted to say that the obligations he assumed are not binding because illegal." (P. 845). As in the instant case, Coyne's contract required him to do no more than to present his principal's case on the merits, nor did the proof show that he did more.

Also in point is the case of *Gilchrist v. Harrah,* 113 P.2d 712 (Cal.2d, 41). There, the plaintiff's attorney had personal influence via close friendship with certain government officials which helped him get a public hearing of his client's problem. Noting that there was nothing secretive or underhanded, and that the merits of the matter were presented, the court refused to relieve the defendant of his obligation to pay for the legal services rendered by the plaintiff.

The courts have purposely left the meaning of the phrase "public policy" loose and free of definition (*Steel v. Drummond,* 275 U.S. 199, 205 (1927)), leaving to the jury under broad general rules the question of the validity of the specific contract in dispute. By denying the writ, this Court will leave undisturbed the principle that freedom of contract must not be lightly interfered with and yet preserve the rule voiding agreements to control the exercise of governmental action to the detriment of the public interest.

III. There Was No Contingent Fee

Demonstrating the ambivalence which was characterized its theories throughout the history of this extended litigation, petitioner *for the first time*[13] contends that an otherwise valid contract to render legal services by presenting the merits of its position to the proper authorities was rendered invalid by the size

[13]Up until the filing of this petition, Southern had only complained of a failure to give a technical charge relating to the jury's consideration of the result and of the size of the verdict.

the verdict which, petitioner says, created a contingent fee.

Clearly, such an untenable position affords no basis for review by this Court. At no point did Mr. Troutman testify or infer that his compensation was to be controlled by his success or failure. Mr. Wilbanks' position from the outset was that there was to be no compensation, regardless of the outcome. The evidence as to the reasonable value of his services ranged from $175,000.00 to $260,000.00. (A. 307, 464, 468, 726). Petitioner elected not to present any evidence in this respect and thus should not be heard to complain.

The trial courts charge[14] made no reference to contingency of recovery but gave the correct rule by which the jury was to measure the recovery.[15] The petitioner made no exception to the charge as given. The Circuit Court made no reference to the point.

---

[14]"In this regard, I charge you that if you find that Mr. Troutman is entitled to recover, he should be awarded the reasonable value of the services rendered. In determining the compensation to be awarded for the reasonable value of these services, you are to consider the amount and character of the services rendered by Mr. Troutman, if any; the responsibility imposed upon him by the task which he was to perform; the labor, time and trouble involved; the character and importance of the matter in which the services were rendered; the amount of the money or value of the property to be affected by the result which he was to obtain; and the professional skill and experience called for on the part of the plaintiff; and finally, Ladies and Gentlemen, you may consider the character and standing of the plaintiff in that profession." (A. 780).

[15]*Stanton v. Embrey*, 93 U.S. 548, 557 (1876); *Beard v. Westmoreland*, 90 Ga.App. 632, 94 S.E.2d 93; *Campbell County v. Howard*, 133 Va. 19, 112 S.E. 876; 7 CJS Attorney & Client §191.

The evil inherent in the use of contingent fee contract is the danger that the avarice of the agent may become overly inflamed by hope of a reward contingent upon success and graduated by the value ensuing to the client. This danger can only be present where, prior to rendering the services, there is such an agreement.

Petitioner's true complaint being that the verdict was excessive, which matter addresses itself to the sound discretion of the trial court,[16] no reason for the writ is shown.

CONCLUSION

There being no valid ground for invoking this Court's jurisdiction, it is requested that the writ be denied.

Respectfully submitted,

Allen E. Lockerman

3500 First National Bank Tower
Atlanta, Georgia 30303

[16] *Baker v. Dillon*, 389 F.2d 57 (5th Cir., 1968).

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the within and foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari on Petitioner by depositing a copy of same in the United States Mail with adequate postage affixed thereto, addressed to Earle B. May, Jr., Esq., Jones Bird & Howell, 4th Floor Haas-Howell Building, Atlanta, Georgia 30303 and Charles A. Horsky, 888 16th St., Washington, D.C. 20006.

This ____ day of July, 1971.

_____

Of Counsel for Respondent

LIBRARY

SUPREME COURT, U. S.

No. 70-330

AUG 12 1971

E. ROBERT SEAVER

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

ROBERT D. TRAIGMAN, JR., *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY OF PETITIONER SOUTHERN RAILWAY COMPANY

CHARLES A. HORSKY
MICHAEL BOOTH
888 Sixteenth Street, N.W.
Washington, D. C. 20006
Attorneys for Southern Railway Company

Of Counsel:

EARLE B. MAY, JR.
6th Floor, Haas-Haguth Bldg.
Atlanta, Georgia 30303

August, 1971

TABLE OF CONTENTS

	Page
REPLY	1
CONCLUSION	5

TABLE OF AUTHORITIES

CASES:

Beard v. *Westmoreland*, 90 Ga. App. 632, 84 S.E. 2d 93 (1954)	4
Bradley v. *American Radiator and Standard Sanitary Corp.*, 6 F.R.D. 37 (S.D.N.Y. 1946)	3
Campbell County v. *Howard*, 133 Va. 19, 112 S.E. 876 (1922)	4
Ewing v. *National Airport Corp.*, 115 F.2d 859 (4th Cir. 1940)	3
Gilchrist v. *Harrah*, 45 Cal. App. 2d 154, 113 P.2d 712 (1941)	2
Noonan v. *Gilbert*, 68 F.2d 775 (D.C. Cir. 1934)	4
Old Dominion Transp. Co. v. *Hamilton*, 146 Va. 594, 131 S.E. 850 (1926)	2-3
Stanton v. *Embrey*, 93 U.S. 548 (1876)	4

Supreme Court of the United States

No. 70-339

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

ROBERT B. TROUTMAN, JR., *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY OF PETITIONER SOUTHERN RAILWAY COMPANY

Respondent Troutman's counter-statement of the case, apart from its reinterpretations of settled facts,[1] is largely an effort to inject matters not pertinent to the questions presented for plenary review. The important point is that the evidentiary facts stated in the petition are nowhere directly controverted in Troutman's brief and, indeed, the critical facts set forth in the petition were drawn essentially from Troutman's own testimony. Pet. 4-5.

[1] These interpretations do not appear entirely consistent with one another. Notably, Troutman's brief paraphrases the testimony of a trial witness as affirming that the Justice Department's decision to adopt Southern's position in the Ohio litigation "was unaffected by any outside influence, including Mr. Troutman." Resp. Br. 5. A few pages later, Troutman's brief refers to the "successful results of the Ohio litigation, precipitated to a very large extent by Mr. Troutman's services . . . ." *Id.* 8-9.

1. The first question posed in Southern's petition requested plenary review of the lower courts' decision that compensation could be collected for the use of personal and political influence to gain an audience with a federal official. The petition showed that the language and rationale of leading cases of this Court appear to forbid on public policy grounds the enforcement of such compensation claims by federal courts. Pet. 9-11. The two lower federal courts which have previously spoken to this issue seem to have taken conflicting views of the relevant Supreme Court precedents. Pet. 11-12.

In conclusory terms, Troutman's brief repeatedly asserts that he did nothing sinister, underhanded or detrimental in the course of his activities. However, he does not deny that his access to the President, the very mainspring of his activities in this case, was made possible only by his personal and political relationship with the President. His generalities therefore do not meet the question posed here whether compensation can be collected for activities based upon use of that special relationship.

Troutman argues that the use of personal and political influence to procure an official audience has been upheld by two state court decisions. *Old Dominion Transp. Co.* v. *Hamilton,* 146 Va. 594, 131 S.E. 850 (1926); *Gilchrist* v. *Harrah,* 45 Cal. App.2d 154, 113 P.2d 712 (1941). While the two cases cited may be distinguished on several grounds, it is sufficient to note that both cases involved collection of compensation through *state* courts for attempts to procure action by *local* officials. Obviously the willingness of two states to adopt looser standards in such matters is no warrant whatever for a departure by the lower federal courts

from the stringent rules established by this Court for cases involving federal officials and federal interests.

The Troutman brief alleges that one of the two state cases—*Old Dominion*—has been "cited approvingly" in *Ewing* v. *National Airport Corp.*, 115 F.2d 859 (4th Cir. 1940), and *Bradley* v. *American Radiator and Standard Sanitary Corp.*, 6 F.R.D. 37 (S.D.N.Y. 1946). Although *Old Dominion* was in fact cited in both instances, neither federal decision cited it for the proposition relied on by Troutman, namely, that personal and political influence to obtain an official audience may be the basis for a court award of compensation.[2] In fact, in both federal cases the agreements involved were held unlawful and compensation was not allowed.

2. The second question posed by the petition was whether this Court's general rule barring "contingent" fees for procuring official federal action could be circumvented by awarding a "reasonable" fee measured importantly by success in obtaining the desired result. The petition cited decisions of this Court establishing the general rule together with a decision applying that rule to an arrangement avoiding the form but having the effect of a contingent fee. Pet. 13-16.

Significantly, Troutman does not challenge the general rule but instead describes as "technical" (Resp. Br. 16) the wrongly omitted instruction which would have prevented the jury from measuring Troutman's

---

[2] *Ewing* cited *Old Dominion*, among other cases, to affirm the principle that "lobbying contracts" are unlawful, in certain circumstances, in state as well as in federal courts. 115 F.2d at 860. *Bradley* cited it as one of a line of cases illustrating the view taken by some courts regarding the legality of contingent fees for procuring government contracts; a line of cases for the contrary view was also cited and *Bradley* was ultimately disposed of on other grounds. 6 F.R.D. at 40.

fee by the successful result allegedly obtained, as the jury clearly did in this case.[3] Certainly the public policy underlying this Court's restrictions on contingent fees involves no "technical" matter. It is no less clear that the action of the courts below, which opens a major loophole in those restrictions, is deserving of review by this Court.

Indirectly, Troutman does attack the general rule by citing several cases to show that the District Court's charge on the measure of recovery was correct even though it omitted the critical instruction preventing an award based on the value of the "result." One of these cases, *Campbell County* v. *Howard*, 133 Va. 19, 112 S.E. 876 (1922), has some pertinence, since the District Court's charge on measure of recovery duplicates *Campbell's* language almost word for word.[4] However, the charge approved in *Campbell* included not only the language of the instruction given by the District Court but, in the immediately following sentence (133 Va. at 51, 112 S.E. at 885), included essentially the same language limiting reliance on the "result" which the District Court here failed to include although requested to do so. See Pet. 8.

Finally, Troutman disputes that "the evil inherent in the use of [a] contingent fee contract" can be pres-

---

[3] Troutman's contention that this error in instructions was waived has been answered in the petition. Pet. 15. See generally *Noonan* v. *Gilbert*, 68 F.2d 775, 776 (D.C. Cir. 1934).

[4] Compare the charge given by the District Court (App. 780) with the statement approved in *Campbell* (133 Va. at 51, 112 S.E. at 885). The other two cases cited do not appear to be relevant. *Stanton* v. *Embrey*, 93 U.S. 548 (1876), concerned a question of admissibility of evidence in fixing an attorney's fee. Even more remote is *Beard* v. *Westmoreland*, 90 Ga. App. 632, 84 S.E.2d 93 (1954), which was a divorce case having no relation to proper standards of compensation for procuring federal action.

ent where no explicit agreement as to fee existed in advance. Resp. Br. 18. Yet the very incentive to misconduct which Troutman's brief attributes to contingent fees and which has led this Court to curtail their use where official federal action is at stake was no less inherent in the measure of recovery permitted by the District Court's instructions. An agent who contemplates a "reasonable fee" measured, in the words of Troutman's own testimony, "primarily on the result" (App. 427) is quite as susceptible to "the danger" posed "by hope of a reward contingent upon success and graduated by the value ensuing to the client" (Resp. Br. 18) as is an agent with an explicit contingent fee contract.

In conclusion, both of the questions set forth in the petition involve important issues of federal public policy appropriate for review in this Court. The questions are sharply posed in this case, because they are not only implicit in the facts but are presented by the very instructions of the District Court. The petition should be granted.

Respectfully submitted,

CHARLES A. HORSKY
MICHAEL BOUDIN
888 Sixteenth Street, N.W.
Washington, D. C. 20006
Attorneys for Southern Railway Company

Of Counsel:

EARLE B. MAY, JR.
4th Floor, Haas-Howell Bldg.
Atlanta, Georgia 30303

August 1971